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CURRENT TOPICS.

In *Coffin v. Smith*, recently decided by the Supreme Court of Vermont, A, a deputy sheriff, attached a quantity of hay, the property of B at the suit of a creditor of B's, by lodging a copy of the writ in the clerks's office. Afterwards and while that attachment was in force, defendant attached the same hay in the same way at suit of other creditors. The first suit being discontinued, plaintiff again attached the hay in the same way at the suit of still other creditors. During all these proceedings the hay remained unmoved on the premises of B, but afterwards, and while affairs were in the posture in which they were left by the last attachment, it was, on application of B, appraised, advertised, and sold by defendant on the writ on which he attached it. In an action of trover therefor the court held that the attachment by defendant, though void at the outset as against plaintiff and the first attaching creditor, was valid as against the debtor, and that when the first suit was discontinued, and plaintiff's constructive possession thereby ended, the defendant's attachment became operative and valid. DUNTON, J., said: "It is claimed by the plaintiff that inasmuch as there was a valid subsisting attachment upon the property in question by him as deputy sheriff at the time the attachment was made by the defendant, the attachment of the latter was absolutely void, and no lien was then or thereafter acquired thereby upon said property. We are not aware that this exact question has ever been before this court until now; but a similar one, as to the validity of a subsequent attachment made by an officer other than the one making the first attachment, where the lien created by the first attachment continued in force or the property had been sold upon execution, has been frequently before the court. It has been repeatedly held that such subsequent attachment is invalid, for the reason that no valid attachment of personal property can be made by an officer without taking actual or constructive possession of the same. By leaving a copy of the attachment in the town clerk's office, an officer acquires the constructive possession of the property attached. There can be no joint possession of such property by officers making different attachments. The constructive or actual possession of the same by the officer making the first attachment excludes the possession of other officers making or attempting to make subsequent attachments. But *cessante ratione legis cessat ipsa lex.* When the constructive possession of the property in question acquired by the plaintiff by the first attachment ceased, its effect upon the second attachment made by the defendant also ceased; and his attachment, which up to that time had been kept in abeyance, became operative and in force; and thereafter the constructive possession of said property was in the defendant until he took the actual possession of the same and sold it, as above stated."

The recent decision of the Supreme Court of Pennsylvania in *Allegheny County v. Gibson*, holding the county liable for damages to property destroyed by the mob in the riots of 1877, has attracted considerable attention. The case was however decided under a statute of Pennsylvania (act of May 31, 1841, P. L. 416) which provided that "in all cases where any dwelling house, or other building or property, real or personal has been, or shall be destroyed within the counties of Philadelphia and Allegheny, in consequence of any mob or riot, it shall be lawful for the person or persons interested in and owning such property, to bring suit against said county where such property was situated, for the recovery of such damages as he or they sustained by reason of the destruction thereof." Although the plaintiff would have been without remedy according to the rules of the common law, the principle embodied in the act is not new to legislation, as shown by the court.

"As early as 1285, the Parliament of England, by statute of Winton or Winchester, (1 Stat. 13 Edw. p. 2 ch. 3; See 1 Hawk. P. C. ch. 68 § 11), provided a remedy against the hundred, county, etc., in which a robbery should take place, for the damages caused thereby, to be recovered by the party robbed, in any action against any one or more of the inhabitants. This statute was re-enacted by 28 Edw. 111, ch, 2. Subsequently the Stat. of 27th Eliz. ch 13, § 2, provided for the assessment of the damages against all the inhabi-

tants of the hundred, after a recovery against one or more. Next we have the famous riot act of 1 Geo. 1 ch. 5, §§ 1 to 7, which was passed by reason of the tumult attendant upon the accession of that king to the throne, and which made it a felony, without benefit of clergy, for any persons unlawfully to assemble and demolish any church or dwelling house. The 6th section of the same act provided that, in case such church or dwelling house should be destroyed, the inhabitants of the hundred in which it was situate, should be liable for its value. This was followed by the Act of Geo. II, ch. 10, § 1, and the laws upon this subject were consolidated in 1827, by 7th and 8th Geo. IV, ch. 31. It will thus be seen that we have imported the principle of the act of 1841, from that country from where we derive the great body of our common law. That it was not transplanted at an earlier date is perhaps due to the fact that new countries, sparsely settled, do not early develope riotous tendencies.

Among the defences set up by the county were these: that at the time of the passage of the act in question, the railroad system of the State out of which the riots grew had no existence; that its framers could not have intended that it should embrace such unlooked for and exceptional cases, and that the mob in question amounted to an insurrection which the county was unable to quell, and for the consequences of which it was not liable. The first ground was held untenable in that it failed to point out what kinds of riots were were within the act. "How can we say," said the court, "that the riots of 1877 were not within its spirit? Is it because of the size of the mob? Yet it did not compare to the London riots of 1780, the Philadelphia riots of 1844, or the New York riots of 1863. Is it because the mob was composed of strikers, and the object of their vengence a railroad corporation? No such exceptions are found in the statute, and to write them in now to meet the exigencies of this case would be judicial *ex post facto* legislation of the most objectionable character. Where is the line to be drawn and by whom? Is the act to apply to mobs of ten persons, and not to those of one hundred? Or to those of one hundred and not to those of one thousand? Is compensation to be made for a broken window, and denied when the entire building is sacked and burned?" The second ground was decided against the defendant because it was not an insurrection within the meaning of that word, but simply a riot, although a very formidable one, and because it had never been held that the resposibility of a city or county for the violence of a mob depends upon its size or formidable character, or that the failure of the civil authorities to suppress it, or that their calling upon the military authorities for aid relieved them from liability. Three notable instances of this are given in support of this position—the No Popery riots of 1780, the Philadelphia riots of 1844, and the draft riots in New York in 1863; in all of which cases the cities were held liable for the damage.

One portion of the opinion of the court recalls the apathy of the civil authorities and the citizens during the first few days of the Pittsburg riots—an apathy which contrasted greatly with the energy displayed in other cities, notably in St. Louis and New York in dispersing the rioters after they had organized or in suppressing them before they had become formidable. For this indifference the citizens of Pittsburg have now to pay, and to pay dearly. As a check to this in future, and as a means of compelling citizens to do their duty in preserving the public peace and the general property, the policy of the act receives the approbation of the court. "It may seem a hard rule," they say, "to hold a community responsible for the effects of mob violence, which, apparently, at least, they had no power to prevent, yet not more so than to hold every inhabitant of the English hundred liable for a robbery of which he knew nothing, and had no means of arresting. In both cases it is a police regulation. It is based upon the theory that with proper vigilance the act might and ought to have been prevented. That this is true with mobs, as a general rule, is well known. A mob is always cowardly, and usually of slow growth. It increases in size and courage just in proportion that the authorities evince hesitation or timidity. That this hesitation is often the result of indifference, if not of open sympathy, is unfortunately too true. It is rare that a mob is without a large body of sympathizers at its commencement. This is because its fury is generally directed against an unpopular object. In populous communities, especially in large cities, there are always antagonisms of race, religion, politics, or social condition, which enables the demagogue to fan the fires of popular discontent, and to incite the disorderly to acts of violence. It is becaus

of this sympathetic feeling that mobs are often enabled to get the mastery, the fact being overlooked that a mob when once aroused and maddened by success, becomes, like a wild beast, dangerous alike to friend and foe. There is nothing upon the face of this record to show that the Pittsburg riots of 1877 were an exception to this rule. We see no evidence of any serious attempt upon the part of the local authorities to suppress it at the time of its commencement. A feeble attempt was made by the sheriff, resulting in the enrollment of some half dozen deputies. But there was no proclamation calling upon the body of the county to come to his assistance in preserving the public peace. No one doubts at this day that if a proper effort had been made at the proper time the mob could have been held in check. No one doubts that it would have been, had the citizens of the county realized that they were responsible for the loss. But this act of assembly, folded away among the pamphlet laws, was probably forgotten or overlooked, even by those who knew of its existence. In the end, the mob that had defied the military power was put down in the main by the civil authorities, after the citizens had been aroused by a sense of common danger. The law will not tolerate the spectacle of a great city looking on with indifference while property to the value of millions is being destroyed by a mob, To prevent just such occurrences was one of the objects of the act of 1841. The fact that the State, when called upon, rendered its assistance, and sent a portion of its military to the scene, did not absolve the county from its implied obligation to preserve the peace, nor from its responsibility for a neglect of that duty. Were it otherwise, it might be to the interest of a municipality to increase the size of the mob."

CONCERNING THE DEGREES OF NEGLIGENCE AS APPLIED TO THE CASE OF COMMON CARRIERS.—I.

Sir William Jones, in his celebrated essay on the law of Bailments, a work which though justly admired for its beauty and conciseness, may yet be said to contain learning without authority and elegance without exactness, distinguishes between ordinary, gross and slight negligenee, thus: Ordinary neglect is the omission of that care which every man of common prudence and capable of governing a family, takes of his own concerns. Gross neglect is the want of that care which every man of common sense, how inattentive soever, takes of his own property. Slight neglect is the omission of that diligence which all circumspect and thoughtful persons use in securing their own goods and chattels. Judge Story gives in substance the same definition in these terms: "Ordinary negligence may be defined to be the want of ordinary diligence, gross negligence to be the want of slight diligence, and slight negligence to be the want of great diligence";[1] and the editor of the later editions of the last work says in a note: "It can not be doubted that there are different degrees of negligence, though the dividing line between them may be narrow, and it may not always be easy to say on which side of the line a particular case may fall. It is possible that no uniform meaning has always been ascribed to the words 'gross negligence,' and the term has sometimes been loosely applied to carriers for hire, whereas it is more correctly used in describing that degree of negligence for which a gratuitous bailee is responsible. But the existence of a practicable difference between the degrees of negligence lies at the foundation of the law of bailments."[2]

There are different degrees of negligence only because there are different kinds of bailments. A bailment may be for the sole benefit of the bailor, as in the case of a person storing the goods of another on his premises without compensation. This is the *depositum* or naked bailment, or the *mandatum* of Lord Holt, of which he says in Coggs v. Bernard, Ld. Ray. 707, "He is not answerable if they

(1.) Story on Bailments, § 17. The terms used by the civil lawyers were *levis culpa*, *lata culpa and levissima culpa*.

(2.) Another commentator has taken a very opposite view. In Smith's Leading cases (note to Coggs v. Bernard, 336), it is said: "Nearly all the confusion and obscurity which belong to the subject of bailments have been occasioned by the unfortunate introduction of the words 'gross' and 'slight' negligence, which do not belong to our law, and which convey no precise idea. The civil law distribution and classification of these liabilities is entirely different from ours; our law has conceived of the legal obligation and duties of men, in relation to their neighbor's property, and has, by this action on the case, defined them with so much comprehension and precision that the same principle applies irrespectively of the seat of the possession."

are stolen without any fault in him; neither will a common neglect make him chargeable; but he must be guilty of some gross neglect;" or it may be for the sole benefit of the bailee, as in the case of a gratuitous loan, in which case the "borrower is bound to the strictest care and diligence to keep the goods, so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect, he will be answerable;" or lastly the benefit may be reciprocal, as in the case of the delivery of goods to be used or worked for reward. In the first case the bailee was held to answer only for gross neglect; in the second for even slight neglect; in the third ordinary diligence only was required of him, and he was answerable only for what was called ordinary neglect. This distinction seemed to be reasonable. It appeared not improper that one who had all the benefit of any transaction should carry the most risk, and that he who had possession of goods under other circumstances than these, should not be required to exercise more diligence than the common run of men exhibit in the transaction of their own affairs.

But in this last class there was one occupation upon which was imposed an extraordinary and exceptional liability. The common carrier, though rendering service to his employer for hire, and therefore for this reason within the third class mentioned, was at a very early day placed upon another and a different footing, being in short held to answer for the goods intrusted to him at all events, "the act of God and the King's enemies only excepted," and this rule, founded long ago, is still adhered to in this country, on grounds of public convenience and public policy. Therefore, it would seem that so far as common carriers are concerned, the division of negligence into degrees would be entirely inconsistent, because wanting the reasons upon which the division has been founded. Yet as we shall see, the courts of this country have again and again spoken of degrees of negligence in the case of common carriers, and have again and again considered the question of their liability as depending upon the peculiar kind of negligence with which they could be properly charged. These cases are reserved for a second paper, the present space being unable to allow more than a short review of the English adjudications in which the subject of the degrees of negligence has been considered.

In a case decided in 1843, and which has often been cited with approval in subsequent cases (Wilson v. Brett, 11 M & W 113,) Rolfe, B., said that he could see no difference between negligence and gross negligence, that the latter was the same thing as the former with the addition of a vituperative epithet. "Any negligence is gross," said Willes J., in Lord v. Midland R. Co., L. R. 2 C. P. 344 (1867), "in one who undertakes a duty and fails to perform it. The term gross negligence is applied to the case of a gratuitous bailee who is not liable unless he fails to exercise the degree of skill he possesses." In Austin v. Manchester etc. R. Co., 11 Eng. L. & Eq. (1852), Cresswell, J., said: "The term 'gross negligence' is found in many of the cases reported on the subject and it is manifest that no uniform meaning has been ascribed to these words, which are correctly used in describing the sort of negligence for which a gratuitous bailee is held responsible, and have been somewhat loosely used with reference to carriers for hire." In Beal v. South Devon, R. Co., 5 H. &. C. 337 (1864), Crompton J., defined the phrase gross negligence as the failure to exercise reasonable care, skill and diligence. And the remarks of Erle J., in Cashill v. Wright, 6 E. & B. 897 (1856), are to the same effect.

Grill v. General Iron Screw Co. L. R. 1 C. P, 600, (1866), was an action on a bill of lading for the non-delivery of goods intrusted to the defendants; and which were lost in a collision. The bill of lading excepted the "perils of the sea," a term which is held to embrace an accidental collision. The plaintiff's replication averred that the loss was caused through the gross negligence of the defendants. On the trial, Erle, C. J. left it to the jury to say whether the collision was occasioned by the negligence of the crew of the defendants. On a rule *nisi* for a new trial, on the ground that the judge ought to have instructed the jury to find whether or not the peril arose from gross negligence, Willes, J., said: "No information, however, has been given us as to the meaning to be attached to gross negligence in this case. * * * Con-

fusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendants to use. A bailee is only required to use the ordinary care of a man and so the absence of it is called gross negligence. A person who undertakes to do some work for reward to an article must exercise the care of a skilled workman, and the absence of such care in him is negligence. Gross, therefore, is a word of description and not a definition, and it would have been only introducing a source of confusion to use the expression gross negligence, instead of the equivalent, a want of due care and skill in navigating the vessel, which was again and again used by the Lord Chief Justice in his summing up." Montague Smith, J., added: "I do not see what more he could have said except it was to use the very word gross, but it certainly would not have enlightened the jury to use an indefinite word without explaining it and no different explanation has been suggested from that which his summing up in fact contained. The use of the term gross negligence is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees, and it is more correct and scientific to define the degrees of care than the degrees of negligence."

Gibbon v. McMullen, L. R. 2 P. C. 317 (1868), was a case against a bank as gratuitous bailees of a quantity of railroad debentures which were stolen by its servants. Lord Chancellor Chelmsford while indorsing the expression of Rolfe, B., in Wilson v. Brett, thought that the terms "gross, ordinary and slight" might be usefully retained as descriptive of the practical difference between the degrees of negligence for which *different classes* of bailees are responsible.

In Horton v. Dibbin, 2 Q. B. 650 (1841), a case against a common carrier of goods, Denman,, C. J., said: "When we find gross negligence made the criterion to determine the liability of a carrier who has given the usual notice, it might perhaps have been reasonably expected that something like a definite meaning should have been given to the expression. It is believed, however, that in none of the numerous cases upon this subject is any such attempt made; and it may well be doubted whether between gross negligence and negligence any intelligible distinction exists."

Austin v. Manchester, etc., R. Co., 11 Eng. L. & Eq. 506 (1852), was an action against a railroad company for injury to horses which it was transporting. By the contract between the carrier and the shipper the former was exempted from liability "however caused to horses or cattle." The declaration alleged that the defendants failed to take due and proper care to provide against friction of the wheels and axles of the carriages in which the horses were, but grossly and culpably neglecting to do so the wheels of the carriages took fire and the injury complained of was sustained. It was contended for the plaintiff that the exception from liability contained in the contract could not cover wilful misfeasance which was charged in the declaration under the name of culpable and gross negligence. But the court held that the carrier was protected by the contract from the consequences of his negligence, and was therefore not liable. After citing the language of Bayley B., in Owen v. Barnett, 2 Cr. & M. 354 (1834), "As for the case of what is called gross negligence, which throws upon the carrier the responsibility from which, but for that, he would have been exempt, I believe that in the greater number of them it will be found that the carrier was guilty of misfeasance,"[3] Cresswell, J., who delivered the opinion of the court, said: "Such certainly were the cases of delivery to the wrong person, sending by a wrong coach or carrying beyond the place to which the goods were consigned. But this observation will not explain all the decisions on the subject. There are others in which the carrier has been held liable for such negligence as warranted the court in holding that he had put off that character. But there is nothing in this declaration amounting to a charge of misfeasance or renunciation of the character in which the defendants received the goods. The charge is that they ought to have taken precaution to guard against the consequences of friction of wheels and axles and that they did not do so and were guilty of gross negligence in not doing so. The terms gross negligence and culpable negligence can not alter the na-

(3.) Negligence differs from misfeasance in this, that the former takes place in the performance of the contract, while the latter is done in direct contravention t it. Angell on Carriers, § 12.

ture of the thing omitted, nor can they exaggerate such omission into an act of misfeasance or renunciation of the character in which they received the horses to be carried. The question, therefore, still turns upon the contract, which, in express terms, exempts the company from responsibility for damages, however caused, to horses, etc. In the largest sense those words might exonerate the company from responsibility even for damage done wilfully, a sense in which it was not contended that they were used in this contract; but giving them the most limited meaning they must apply to all risks of whatever kind and however arising, to be encountered in the course of the journey, one of which is undoubtedly the risk of a wheel taking fire, owing to neglect to grease it. Whether that is called 'negligence' merely, or 'gross negligence' or 'culpable negligence' or whatever other epithet may be applied to it, we think it is within the exemption from responsibility provided by the contract, and that such exemption appearing on the face of the declaration no cause of action is disclosed."

CONSTITUTIONAL LAW.

STATE v. READ.

Supreme Court of Rhode Island, July, 1879.

The public laws of Rhode Island, chap. 629, which, subject to certain exceptions, prohibit the sale of any merchandise within one mile of the place where a religious society is holding an out-door meeting, unless the society consents to the sale, is a police regulation, and as such is constitutional.

Constitutional questions certified to the Supreme Court under Gen. R. I. cap. 209, §§ 1-9.

Ira O. Seaman, for plaintiff. *Dexter B. Potter*, for defendant.

DURFEE, C. J., delivered the opinion of the court:

The question submitted in this proceeding is whether Pub. Laws R. I. cap. 629, of March 30, 1877, is constitutional. The act is as follows, to wit: "An act for the Further Protection of the Meetings of Religious Societies.

"It is enacted by the General Assemby as follows:—

Section 1. Whenever any religious society shall hold any camp, tent, grove, or other out-door meeting, for any purpose connected with the object for which such religious society was organized, no person, without the consent of such religious society or of its proper officers, shall keep in any shop, tent, booth, wagon or carriage, or other place for sale, or expose for sale any spirituous or intoxicating liquors or other drinks, or food, or merchandise of any kind, or hawk or peddle any such liquors, or merchandise within one mile of the place of such meeting; nor shall any person engage in gaming, horse-racing or exhibit or offer to exhibit any show or play within the like distance of one mile of such meeting; and any person violating any provision of this act shall be fined not exceeding twenty dollars or less than five dollars, or be imprisoned not exceeding thirty days. Provided, however, that nothing herein contained shall be construed to prevent innkeepers, grocers, or other persons from pursuing their ordinary business at their usual place of doing business, nor to prevent any person from selling victuals in his usual place of abode."

The defendant was convicted on a complaint charging him with keeping and exposing for sale certain drinks, food, and merchandise in violation of the chapter. He objected in the course of the trial that the chapter is unconstitutional. The question of its constitutionality is certified for decision under Gen. Stat. R. I. cap. 209.

The defendant contends that the chapter is unconstitutional because it takes private property for private use, and that too without compensation. He refers to Commonwealth v. Bacon, 13 Ky. 210. In that case an amendment of the charter of the Bourbon County Agricultural Society, making it unlawful for any person, without the consent of the directors of the society, to open a stable or place within three hundred yards of the society grounds, for the purpose of receiving horses or vehicles for pay, during the continuance of the society's fairs, was held to be unconstitutional, because it restricted the right of other persons to use their property in a particular manner, so that the society might have an opportunity to use its property in that manner to greater profit. The design of the statute was to create a monopoly in favor of the society.

The case is in point if chapter 629 was enacted for such a purpose. We see no reason to suppose that it was enacted for any such purpose. It does not restrict the right of any person to carry on his ordinary business at his usual place of business. It also permits any person to sell victuals in his usual place of abode. It is not enacted for the benefit of any particular religious society, but it extends to every such society when holding a camp meeting. The chapter is ostensibly designed for a police regulation. We see no reason for supposing that its ostensible is other than its real design. To allow peddlars, hawkers and hucksters of every sort to frequent the vicinity of camp meetings for the sale of their wares, without any restriction, would inevitably tend to disorder, intemperance, and immorality. It is urged that a mere selling of food, or of other innocent or necessary articles, can do no harm. This would be true if selling those articles were not used as a cover for the sale of intoxicating liquors, or of other injurious or immoral things. The restriction is general, because if not general it would be unavail-

ing. It is imposed not only for the protection of the societies which hold the meetings, but also for the good of all who attend them. In other words it is a police regulation.

The chapter, so considered, is clearly constitutional. It restrains the individual in the use of his property for the public good. Nothing is more common than the imposition of such restraints.

Our Sunday laws are illustrations of it. So are statutes which prohibit the storage of gunpowder, or the keeping of swine, or the erection of wooden houses of more than a limited height in the compact part of cities, or the sale of milk which has been watered. And so is our statute requiring certain shows or exhibitions to be licensed. These statutes restrict the uses of property; but they are valid, nevertheless, because they are passed to promote the public welfare. Cooley Constit. Limit. *572-596. And it is no objection to them that they are local in their application, so long as they are designed to subserve a public purpose within the locality. Cooly Constit. Limit. *390.

The decision of the court is that chapter 629 is not unconstitutional, and that the defendant, if duly convicted, is liable to punishment for the violation of it.

EXECUTIONS—LEVY ON GROWING CROPS.

BURLEIGH v. PIPER.

Supreme Court of Iowa, October, 1879.

The office of a writ of execution is to collect a debt, not to secure it. Therefore, the levy of an execution upon an unripe and growing crop, if made so long before the sheriff can sell it as to show an intention to hold the levy merely as security, is not valid as against subsequently acquired liens.

Appeal from Mitchell Circuit Court.

Action to replevy certain grain. The plaintiff claims the grain by virtue of a chattel mortgage executed to him on the thirtieth day of June, and while the grain was growing. The defendant claims the grain by virtue of the levy of an execution against the mortgagor, made by him as sheriff of Mitchell county on the tenth day of May previous. The grain was raised by the execution debtor upon leased premises. No actual possession was taken of the grain by the sheriff until August 30th, when it had been harvested and stacked by the debtor, and some of it threshed. The execution in the meantime had expired and been returned, and another issued commanding a sale of the property levied upon. There was a trial by jury, and verdict and judgment were rendered for the defendant. The plaintiff appeals.

D. W. Poindexter, for appellant. *Brown & Bishop*, for appellee.

ADAMS, J., delivered the opinion of the court:

The material question in the case arises upon an instruction given by the court in these words: "If the officer who holds an execution for service and levy on growing crops, before they are ripe or in a suitable condition to be removed, goes on the premises where the crops are situated and enters the levy on the execution with an accurate description of the crops levied upon, and gives the execution debtor notice of the levy, it would constitute a good and valid levy on the crops, and a levy so made would be a lien on the crops levied upon from the date of the levy." The giving of this instruction is assigned as error. The plaintiff insists that an unripe and growing crop is not subject to levy upon execution, though raised by a tenant; and even if it were, that the mode of levy set forth in the instruction, and which was the mode employed, would be insufficient. In the view which we take of the case it is not necessary to determine either of these questions. Upon the first there is some conflict of authority, and the members of this court might not be entirely agreed. Conceding that a valid levy of an execution may be made upon an unripe and growing crop, and that the mode set forth in the instruction and employed in this case is not objectionable, we have still to determine whether the levy made can, in view of all the circumstances of the case, be sustained. The plaintiff contends that the office of the writ was perverted in that it was used, for a time at least, merely to effect a lien, and the further execution of the writ suspended by the direction of the judgment creditor.

It appears to us that the office of a writ of execution is to collect a debt, and not merely to secure it. Now the evidence in the case shows that while the sheriff was directed by the judgment creditor to make no sale until the grain had been harvested and stacked, the writ was put into his hands on the second day of May, and the levy was made as soon as the grain was barely up. The general rule is that, after the levy of an execution, the suspension of the further execution of the writ under the directions of the judgment creditor, will render the levy void as against after acquired liens. Hickman v. Caldwell, 4 Rawle, 376. It might, perhaps, be claimed that not much importance is to be attached to the directions given by the judgment creditor, for the reason that a postponement nearly if not quite as great as directed was necessary in the very nature of the case. But the principle involved is the same. The writ was used for the time for the purpose merely of holding a lien upon the property. While mere procrastination by an officer after levy will not invalidate the levy, it is not the less his duty to proceed forthwith to advertise and sell. If he is prevented, either because the judgment creditor directed a postponement, or because he directed a levy so early as to necessarily result in a postponement, we think that the levy will be invalid as against subsequently acquired liens. In Herman on Executions, § 185, the author says: "Any act which shows that a party does not intend that a writ shall be executed before return day, or in accordance with statutory provisions relating to final process, will, as between such party and third persons, or other judgment creditors of the debtor, discharge the property seized from the lien of such execution," citing Weir v.

Hale, 3 W. & S. 285; Mentz v. Hauman, 5 Whart. 150; Howell v. Alkyn, 2 Rawle, 283. In the case at bar the judgment creditor knew, when he put the writ into the hands of the officer, that there was hardly a possibility that the writ could be fully executed by the sale of the crop in question during the life of the writ, and that in any event the execution of the writ must be suspended for several weeks.

The purpose of making the levy thus early must have been solely to require a lien to be held for a time as security, or, to use the language of Chief Justice Gibson in Hickman v. Caldwell, *supra*, "to keep other creditors at bay," which purpose, it was held in that case, was not legitimate. It follows, from the view which we have taken, that the instruction given was too broad, under the circumstances of the case. It held that the levy was valid if made in the mode described. In our own opinion a levy of an execution upon an unripe and growing crop is not valid as against subsequently acquired liens, if made so long before the officer can properly proceed to advertise and sell as to evince an intention on the part of the judgment creditor to hold the levy for a time merely as security, and especially if it is reasonably certain, at the time of the issuance of the writ, that it can not be fully executed by the sale of the crop during the life of the writ, but that the judgment debtor must be put to the expense of another writ. Reversed.

MINING—LIABILITY FOR SURFACE SUPPORT.

YANDES v. WRIGHT.

Supreme Court of Indiana, October, 1879.

Where there are two mines, one being situated immediately above the other, the proprietors of the lower mine are bound at their peril not to weaken the natural support of the upper; and if they do so and damages ensue to the owners of the upper mine, the former are liable for such damages, even though there be no negligence on their part in their mining operations.

Appeal from the Clay Circuit Court.

BIDDLE, J., delivered the opinion of the court:

On the 21st of October, 1864, David Cornwell, the lessor, granted to the appellee and George Elbreg, "the sole right to dig, mine, use or sell clay, situated on the" land described in the lease, ("except such clay as the first party may dig for potters' use.") Also the right to dig and mine coal on the same premises. Elbreg assigned his interest in the grant to the appellee, by which he holds the entire right under it. On the 31st of August, 1865, David Cornwell granted to Elbreg, Montgomery & Co., a right in the same lands, "to have, hold and possess all the coal, iron, lead and other productions, whether of a vegetable or mineral origin, under the surface, except, however, all the clay and stone, heretofore let to Wright and Elbreg." This grant was assigned by Elbreg, Montgomery & Co., to the appellants, thus giving them the entire right to the things granted, subject to the grant before made to the appellee. Each grant runs for the term of twenty-five years, and each party entered upon his premises, commenced and prosecuted his mining operations. The grant to the appellants lies about thirty feet below the grant of the appellee, in the direct line of gravitation.

The appellee, as plaintiff below, avers in his complaint that appellants, the defendants below, without any negligence on the part of the plaintiff, so negligently, carelessly and unskilfully located and insecurely constructed a certain entry or room underlying an entry or room made by plaintiff in said clay strata, and so carelessly managed and insecurely propped the same as to cause, by the said negligence, carelessness and unskilfulness, the intervening strata of rock, slate and other substances to cave and fall in, and thereby destroy and render wholly useless one of the main entrances constructed by plaintiff, leading into said strata and veins. By reason of which, etc.

The complaint was tested by a demurrer alleging the insufficiency of the facts as ground, and held by the court to be sufficient. Answer of general denial, trial by jury, verdict for appellee and judgment, from which this appeal is prosecuted.

The appellants present three questions for our consideration: 1. The sufficiency of the complaint. 2. The propriety of the instructions. 3. The sufficiency of the evidence to sustain the verdict.

1. The first question may be considered as waived.

2. It is contended by the appellants that if the owner of the lower mine removed his mineral in the usual and proper course of mining, without negligence or wrong on his part in leaving the proper support for the upper mine, he will not be liable for damages caused by the natural effect of the laws of gravitation. The appellee insists that if the owner of the lower mine, in removing his minerals, so weakened the support of the surface in its natural condition as to cause its subsidence, and thereby injured the upper mine, he will be liable for all damages that ensue therefrom, and that no degree of care, skill or diligence exercised in his mining operations will excuse him from such liability.

We need not set out the instructions complained of, for it is plain that if the appellants are right in their view of the law, the instructions given were erroneous and those refused correct; but if the appellee is right in what he claims to be the law, then the instructions given were proper and those refused, erroneous.

This question is carefully examined and decided in the case of Humphries v. Brogden, 64 Eng. Com. L. 738. In that case "it appeared that the defendant had taken the coals under the plaintiff's closes, without leaving any sufficient pillars to support the surface, whereby the closes had swagged and sunk, and had been considerably injured;

but that, supposing the surface and the minerals to have belonged to the same person, their operations had not been conducted carelessly or negligently, or contrary to the custom of the country. The jury found that the defendant had worked carefully and according to the custom of the country, but without leaving sufficient pillars or supports. A verdict was entered for the plaintiff for £110 damages, with leave to enter a verdict for the defendant if the court should be of opinion that under these circumstances the action was not maintainable." Lord Campbell, C. J., in delivering the opinion of the court, says: "We have attempted, without success, to obtain from the codes and jurists of other nations information and assistance respecting the rights and obligations of persons to whom sections of the soil, divided horizontally, belong as separate properties. This penury, where the subject of servitudes is so copiously and discriminately treated, probably proceeds from the subdivisions of the surface of the land and the minerals under it into separate holdings being peculiar to England." But his lordship cites and analyizes a number of authorities which more or less directly support his opinion. He concludes by quoting the following extract from Erskine's Institutes of the Law of Scotland, Book 2, Title 9, sec. 11, and note: "Where a house is divided into different floors or stories, each floor belonging to a different owner, which frequently happens in the city of Edinburgh, the proprietor of the ground floor is bound, merely by the nature and condition of his property, without any servitude, not merely to bear the weight of the upper story, but to repair his own property that it may be capable of bearing the weight. The proprietor of the ground story is obliged to uphold it for the support of the upper, and the upper must uphold that as a roof or cover to the lower." His lordship then sums up the case in the following words: "For these reasons we are of opinion that the present action is maintainable, notwithstanding the negation of negligence in the working of the mines; and that a rule to enter a verdict for the defendant must be discharged."

We have found some English authorities besides those cited by Lord Campbell in Humphries v. Brogden, *supra*, and some subsequently decided, and also some American authorities. The right of surface support is treated by Blanchard & Weeks on Mines and Mining, 616-619, wherein they lay down the common law rule and refer to several authorities in support of it, in the following words: "There is a *prima facie* inference at common law upon any demise of minerals or other subjacent strata, when the surface is retained by the lessor, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right to support. In the absence of express words showing clearly that he has waived or qualified his right, the presumption is that what he retains is to be enjoyed by him, *modo et forma*, and with the natural support which it possessed before the demise." In Wood on Nuisances the rule is expressed as follows: "Where there is a simple conveyance of the surface, reserving the mines with the right to enter upon the surface to work the same, and no express power given or reserved to produce a subsidence of the surface if necessary in working the mines, the person owning the minerals is bound at his peril not to cause subsidence of the surface, even though he can not work his mines at all without doing so; and no degree of care or skill exercised in the mining operations will shield him from liability to the owner of the surface for all damages sustained by reason of any subsidence thereof."

In deciding the case of Jones v. Wagner, 66 Penn. 427, Thompson, C. J., said: "The right of support, *ex jure natura*, which the owner of the soil is entitled to receive from the minerals underdeath has, within comparatively a few years, received much attention in the courts of England, and the rule deducible from the cases in all the courts, House of Lords, Exchequer, and Queen's Bench, is that where there is no restriction or contract to the contrary, the subterranean or mining property is subservient to the surface to the extent of surface-support to sustain the latter, or in default there is a liability to damages by the owners or workers of the former for any injury consequent thereon to the latter. * * That if any owner of lands grant a lease of the minerals beneath the surface, with a power to work and get them, in the most general terms, still the lessee must leave a reasonable support for the surface; and so, conversely, when the minerals are devised and the surface retained by the lessor, there arises a *prima facie* inference at common law upon every such demise that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right of support. * * These citations prove two things, viz: that the owner of a mineral estate if the law be not controlled by the conveyance, owes a servitude to the superincumbent estate of sufficient supports; consequently the failure to do so is negligence and may so be disclared upon." In the case of Coleman v. Chadwick, 80 Penn. St. 81, it was held that "when the owner of the fee grants the minerals, reserving the surface, his grantee is entitled only to so much of the minerals as he can get without injury to the surface." The following authorities maintain the same principles: 79 Penn. 245; 55 N. Y. 538; L. R. 4 Eq. Cases, 613; 5 M. & W. 60; 3 K. & T. 695; Bainbridge on Mines 485.

It should be noticed throughout the cases above cited that the word surface, as used in the books, means not merely the geometrical superficies without thickness, but includes whatever earth, soil or land lies above and superincumbent on the mine. Surface therefore includes the appellee's mine which lies upon the appellant's mine and below the top surface which still may remain undisturbed and uninjured in the original grantor. Humphries v. Brogden, *supra*. See also 2 Abbott's Law Dic. Title Surface, and Burkhart v. Hanley, 23 Ohio, St. 558.

We have also carefully examined the cases cited by the appellant and find none that conflict with the above views. They all treat mainly upon the rights in flowing water used in mining, in which

only a usufruct interest can be held and which is very different from the permanent right which may be obtained in the solid surface superincumbent upon a mine. They are therefore not in point.

3. The evidence was sufficient to support the verdict. Judgment affirmed.

LIABILITY OF OWNER OF BUILDING FOR NEGLIGENCE OF SERVANTS OF OCCUPANT.

STEWART v. PUTNAM.

Supreme Judicial Court of Massachusetts, November Term, 1878.

Defendants, the owners, as trustees, of a building, who had leased the same to A, on October 1, 1876, entered into a contract with A, by which it was stipulated that the lease should terminate on that day; that A released all improvements put by him upon the premises, and all claims against the defendants and the estate; that A "is made agent for said trustees to lease and collect rents and have general charge of said premises for the space of one year and three months from date, and will at his own expense furnish porterage, water, steam, heat and gas for the same, and make all inside repairs, but is not authorized to contract any liabilities in behalf of said trustees. For his services as such agent until January 1, 1877, he is to receive no compensation, and he guarantees that said trustees shall receive to and including January 1, 1877, the same net rent, including interest on betterments, and excluding taxes, as though said lease were not terminated until January 1, 1877." Between said dates, A having the general care and control of the building and the cellar thereof and the sidewalk adjoining by virtue of said contract, the plaintiff was injured by falling into a coal-hole negligently left open and unprotected by B, who was employed by A to take care of and keep clean the building, cellar and sidewalk: *Held*, that under said agreement, for the three months ending with January 1, 1877, the defendants had no authority in nor control over any part of the building, for any purpose, and that they were not liable to the plaintiff.

Action of tort to recover for personal injuries occasioned to the plaintiff by the negligence of the defendants in leaving open and uncovered a coal hole in the sidewalk in front of a building on Exchange Place, Boston.

At the trial in this court before Morton, J., it was admitted that Exchange Place, including said sidewalk, was a public highway; that at the time of the plaintiff's injury the defendants were seized in fee of said building and land, as trustees, under the will of William S. Perry, deceased; that on January 20, 1872, Perry made a lease in writing of the same to Elijah D. Goodrich; and that, on October 1, 1876, the defendants and Goodrich entered into a contract, the material parts of which are sufficiently set forth in the opinion. The plaintiff introduced evidence that, on November 23, 1876, the date of his injury, Goodrich had the general care and control of the building including the cellar under the building and under the sidewalk and of the coal-hole, under the provisions of the above contract; that no other person had any occupancy, care or control of said cellar or coal-hole; that Goodrich employed one Jones, who took care of and kept cleaned the leased offices in the building, the vacant offices, the entries, outside doors, cellar and sidewalk; that the persons holding leases of the offices had the right to use the steam heat for warming their offices; that Goodrich had purchased coal for producing said heat; that for the purpose of putting the coal into the cellar, Jones unfastened the cover of the coal-hole, and partly raised it up; when the men who came to deliver the coal removed the cover and left the coal-hole open and unprotected; and that the plaintiff, walking on said street, and using due care, fell into the coal-hole and received the injuries complained of.

Upon the above facts, the judge ruled that the defendants were not liable in this action; directed the jury to return a verdict for the defendants, and reported the case for the consideration of the full court. If the ruling was correct, judgment was to be entered on the verdict; otherwise, a new trial was to be ordered.

G. A. Somerly and *F. Ely* for plaintiff; *R. D. Smith* and *C. T. Russell, Jr.*, for defendants.

SOULE, J. delivered the opinion of the court:

This case depends on the construction and effect of the agreement of October 1, 1876, which is made a part of the report. Before it was executed Elijah D. Goodrich was in possession of the premises owned by the defendants, under a lease for years, and had the entire control thereof. He and not the landlord was bound as between himself and the public so far to keep the buildings and structures abutting on the highway in repair that the way should be safe for travelers. Kirby v. Boylston Market Association, 14 Gray 249; Shipley v. Fifty Associates, 101 Mass. 254; Leonard v. Storer, 115 Mass. 86. The question therefore arises whether the agreement of October 1st. made such a change in the relations of the parties to the premises as to shift the responsibility from Goodrich to the defendants.

It is argued that the agreement is void because it was signed by one only of the trustees. This position, however, is not open to the defendants, because the report shows that they admitted at the trial they made the agreement. What, then, is its effect? By it the parties expressly stipulate that the lease under which Goodrich theretofore held should terminate on that day. Goodrich releases to the defendants all improvements and property put by him upon the leased premises, and all claims against the trustees and the trust estate; and assigns to them all subleases whether oral or written. The defendants release Goodrich from the covenant in the lease to pay the taxes for the current year and agree that they will pay them. It is then stipulated as follows: "Said Goodrich is made agent for said trustees to lease and collect rents and have general charge of said premises for the space of one year and three months from date, and will at his own expense furnish porterage, water, steam, heat and gas for the same, and make

all inside repairs, and keep the same in good order, except as hereinafter provided, but is not authorized to contract any liabilities in behalf of said trustees. For his services as agent until January 1, A. D. 1877, he is to receive no compensation, and he guarantees that said trustees shall receive to and including January 1, 1877, the same net rent including interest on betterments and excluding taxes, as though said lease were not terminated until January 1, 1877, the same to be payable at the same time as provided in said lease. From January 1, 1877, to January 1, 1878, said trustees are to receive the gross rents of said premises, and for services and expenses of said Goodrich during said period, said Goodrich shall be paid as follows: Ten per cent of the rents actually collected, being for his services, and six hundred dollars, being in full for expenses of water, gas, steam, heat, porterage, and inside repairs." Then follows a provision as to times of paying those amounts to Goodrich, and a statement that he is not bound to repair damages caused by fire, extraordinary casualty, defective construction, or by want of outside repairs, nor to furnish gas nor janitor with any leased rooms. A majority of the court are of opinion that, under this agreement, for the three months ending with January 1, 1877, Goodrich had the right to lease all vacant parts of the premises, and to receive the rents thereof as well as the rents of the parts already let to his own use, and that the defendants had no authority in nor control over any part of the building for any purpose. The old lease was terminated, and the existing subleases were assigned to them; but by the same instrument by which this was effected, the rents for the parts leased with the right to lease the rest and receive the rents were granted to the original lessee, he undertaking to pay such rent therefor that, at the end of the three months, the defendants should have received for the whole year the same net rents as if the lease had not been terminated, less the amount of taxes for the year. The only change wrought by the agreement, for the three months, was that Goodwich was released from the duty to make outside repairs as called for by the lease. But he continued in the same complete occupancy and control of the premises as before. The agreement amounts practically, if not techincally, to a lease to Goodrich for three months of that part of the property not let to tenants, and of the reversion of that part which was let. Fiske v. Farningham Man. Co. 14 Pick. 491; Dutton v. Gerrish, 9 Cush. 93. The fact that he is termed the agent of the defendants is not enough to do away with the legal result of the stipulations of the agreement.

This being the effect of the agreement of October 1, 1876, and the injuries of the plaintiff having been received in consequence of a negligent use of the coal-hole in the sidewalk, connected with the premises, during the three months for which Goodrich, and not the defendants, had control of the premises, the case is brought within the principle of the cases first above cited.

It differs from the case of Tarry v. Ashton, L. R. 1 Q. B. Div. where the question was whether the person who maintained in front of his dwelling-house a hanging lamp which projected over the highway, or the contractor who imperfectly repaired it several months before it fell, was responsible for the injury sustained by the plaintiff on whom it fell. It was there decided that the occupant of the house was liable, on the ground that one who maintains a lamp thus projecting, for his own convenience, is bound so to maintain it that it will not be dangerous to passers by. Nor is it a case where the owner or occupant of the land contracts for doing that which is certain to be attended with injurious consequences, if they are not specially guarded against, and liable is if they are not prevented, no matter by whose fault the omission occurs, as in Bower v. Peats, 1 Q. B. Div. 321; Homan v. Stanley, 66 Penn. 464. It is merely a case where the occupant of premises, having the absolute control of them, and having employed a servant to do certain work about them, is liable for the consequence of the servant's negligence. Judgment on the verdict.

MORTGAGE — EQUITY OF REDEMPTION — STATUTE OF LIMITATIONS.

LOCKE v. CALDWELL.

Supreme Court of Illinois.

[Filed at Springfield, June 20, 1879.]

1. MORTGAGE—EQUITY OF REDEMPTION — WHAT A BAR.—Twenty years possession by the mo ...gee of property mortgaged, without account or acknowledgment of any subsisting title, is a bar to the equity of redemption, unless the mortgagor can bring himself within the proviso in the statute of limitations. This rule is reciprocal, and the mortgagee may be equally barred by lapse of time, when the mortgagor, after the forfeiture, has been permitted to retain possession for twenty years, unless circumstances can be shown to repel the presumption of payment.

2. POSSESSION MUST BE ACTUAL.—The possession in each case must be actual and not constructive, even when the lands are wild and uncultivated, in order to create the bar.

SHELDON, J., delivered the opinion of the court:

This was a bill in equity filed in the Circuit Court of Greene County on January 4th, 1875, to foreclose a mortgage given by David Locke to John Caldwell on the 13th day of April 1839 and duly recorded on the same day, on east half of the southeast quarter of section 22 and the west half of the southwest quarter of section 23 in township 10, north of range 13, west of the third principal meridian, in the County of Greene in this State; also lot 198 in Carrollton in said county, to secure the payment of a promissary note of even date with the mortgage, made by Locke to Caldwell for $300 payable in twelve months with interest at the rate of twelve per cent per annum. A decree of foreclosure was granted and the defendants appealed.

The defense set up was the bar of the statute of limitations and the staleness of the claim. The following facts appear. The town lot was vacant and unimproved and the land was wild and unimproved timber land and the latter so continued until April 1874 when a son of the mortgagee, claiming under him by will, put up a building on one of the tracts. A short time after the giving of the mortgage David Locke, the mortgagor, departed from the State of Illinois and has not been within the jurisdiction of the State since, going to the State of Missouri and residing there. Since the year 1845 Caldwell, the mortgagee, and those claiming under him, regularly paid the taxes on the land. In the year 1850 John Wright, having purchased a tax-sale certificate to the town lot, purchased the lot from John Caldwell, paying him therefor fifty dollars and received a deed of it from Caldwell and has been in possession of it ever since, shortly afterward putting up a house on it, and he has improved it otherwise and paid the taxes on the lot. In the neighborhood the land was called Caldwell's land. On March 21, 1874, James A. Locke the son of David Locke purchased the two timber tracts from David Locke for $1,000, receiving a quit claim deed therefor. Franklin Caldwell, a son of the mortgagee, one of the devisees of all his real estate, put up a cabin on the land on the 7th of April, 1874, and occupied it by a tenant until in November thereafter. On August 13th, 1874, George Daw and John H. Snyder purchased the two timber tracts from James A. Locke for $2,000, the latter giving to them a warranty deed and they immediately afterwards went into possession. On the 19th day of May 1874 David Locke executed to James A. Locke a quit claim deed for lot 198, the town lot. John Caldwell died, and the complainant is his widow and executrix of his will and one of his devisees.

As respects the town lot there can be no question that the title is complete in Wright under the mortgage. He has been in the actual possession of the lot, claiming an estate in fee under the mortgage for more than twenty-five years.

It is the well settled general rule that twenty years possession by the mortgagee, without account or acknowledgment of any subsisting mortgage, is a bar to the equity of redemption, unless the mortgagor can bring himself within the proviso in the statute of limitations. Demorest v. Wynkoop, 3 Johns. Ch. 129, and other cases. The equity of redemption being barred as to the town lot makes the mortgage title to it complete.

In Harris v. Mills, 28 Ill. 44, this court held that when the note, for the security of h a mortgage was given, was barred by the statute of limitations, the right to foreclose the mortgage was also barred. The statutory limitation in this case of an action upon the note which the mortgage secured was sixteen years under the statute in force at the time the note was given, and ten years under the present statute in force at the time this suit was commenced. But each of the statutes provides that if the person against whom was a cause of action, except real or possessory actions, should be out of the State any time during which a suit might be sustained on the cause of action, suit might be brought after his return to the State and the time of such absence should not be taken as a part of the time limited. There was no bar then here of an action upon the mortgage debt, the period of the mortgagor's continued absence from the State preventing it.

The general rule which has been stated as to twenty years possession of the mortgagee barring the equity of redemption is reciprocal and the mortgagee may be equally barred by lapse of time, the general ru le being that when the mortgagor after the forfeiture has been permitted to retain possession for twenty years, the mortgagee will be presumed to have been discharged unless circumstances can be shown sufficiently strong to repel the presumption, as payment of interest, a promise to pay, an acknowledgment by the mortgagor that the mortgage is still existing and the like. Hughes v. Kent, 9 Whart. 648; 4 Kent Com. 11th Ed. 216.

It is sometimes otherwise expressed that a mortgage is not evidence of a subsisting title, if the mortgagee never entered and there has been no interest paid or demanded for twenty years; that these facts authorize and require the presumption of payment. Giles v. Baremore, 5 Johns. Ch. 545.

But this, as we understand, presupposes that the mortgagor is in possession and in the actual possession. In Moore v. Cable, 1 Johns. Ch. 386. Chancellor Kent in declaring the rule that twenty years possession by the mortgagee was the period adopted by the court of equity as sufficient to bar the right of redemption, remarks: "Nor will a mere constructive possession for twenty years be sufficient. The courts require an actual possession by the mortgagee during the period thas is to form the equitable bar, for as they adopt the rule by analogy to the statute of limitations, it requires the same actual and continued possession to form a bar in equity that is requisite to form a bar at law. The idea suggested by the counsel for the defendant that as the mortgaged premises were probably wild, uncleared lands, possession is to be deemed to have followed the right and to have been in the mortgagee after default of payment, is not applicable to this case. That fiction was adopted by the courts to preserve the lands of the true owner, while in their uncultivated state, from intrusion and trespass, and it would be a perversion of the rule to make it operate by way of the extinguishment of a right. Nothing short of actual possession for twenty years will at law toll the entry of the true power; and the equity of redemption, which in this court is the same as the fee at law, ought to be equally protected." In Bollinger v. Chouteau, 20 Mo. 89, this same doctrine was applied, and a bill to redeem sustained after the lapse of thirty-six years from the execution of the mortgage, actual possession on the part of the mortgagee not having been taken until within twenty years before the commencement of the proceedings to redeem.

In general the respective rights of mortgagee and mortgagor with regard to foreclosure on the

one hand and redemption on the other, are treated as mutual; that is, the existence of the former is held to involve that of the latter, and *vice versa*, and the fact that the one can not legally be enforced under the circumstances, is regarded as sufficient to preclude a claim for the other. It is said, "the right to forclose and the right to redeem are reciprocal and commensurable." 2 Hilliard on Mortgages, sec. 2.

The land here being wild, unimproved timber land, and there having been no actual possession by either mortgagee or mortgagor until within less than one year before the commencement of this suit, there would, under the authorities cited, be no bar, from the lapse of time, of the right to redeem, and the right being reciprocal, it follows there is no bar of the right of foreclosure.

There could not well be any presumption from the lapse of time of the payment of the mortgage debt under the circumstances and so long as the time of limitation provided by the statute for the case had not run against the debt.

Nor do we think the defense should prevail under the doctrine laid down in 2 Story's Eq. Jur. sec. 1520, that "a defense peculiar to courts of equity is that founded upon mere lapse of time and the staleness of the claim in cases where no statute of limitations directly governs the case. In such cases courts of equity act sometimes by analogy to the law and sometimes act upon their inherent doctrine of discouraging for the peace of society antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights or long and unreasonable acquiescence in the assertion of adverse rights." As accounting for not sooner foreclosing was the removal of the mortgagor from the State, and so far as appearances showed, the entire abandonment by him of the equity of redemption. There was constant assertion of claim under the mortgage by disposal, by sale of a portion of the mortgaged premises and paying the taxes every year on the remainder There was no acquiescence in the assertion of adverse rights for none such were asserted until just before the commencement of the suit. The decree of foreclosure will be affirmed.

Decree affirmed.

ASSAULTS ON THE POLICE IN THE EXECUTION OF THEIR DUTY.

There is a subject to which attention is constantly called, by convictions and sentences at the assizes, and other criminal courts, and which was lately illustrated by a judicial decision in the Queen's Bench, and appears to require greater consideration than it has hitherto received; we mean the offense of assaulting or obstructing the police in the execution of their duty. This, as is well known, is an offense visited with some severity, upon the principle that it is necessary to uphold and protect the police in the execution of their duty. Thus, at a recent assizes at Maidstone, a man was sentenced to twelve months' imprisonment with hard labor, for kicking a policeman; and, at the late assizes at Durham, Lord Justice Bramwell sentenced three men, who had knocked a policeman about, to ten years' penal servitude, observing that it was "necessary, in the interests of society, that policemen should be protected; and that due retribution should fall upon those who maltreated them." There is no doubt of this; but there is another view of the subject which is equally if not still more important—that the people should be protected from the abuse of power on the part of the police, who are, for the most part, ignorant men, often of violent passions, placed in a position of great power, and often tempted or disposed to abuse it. The peculiar danger arising from their position is this: that they are in a position of apparent authority, and that, if they abuse their power and are resisted, they are at once the accusers and the witnesses. They can convict the accused on their own testimony, and wreak a terrible revenge for any resistance they may encounter. Hence the law, while providing peculiarly severe penalties for the offense of assaulting or obstructing them in the execution of their duty imposes, in the very definition of the offense, a condition that they, at the time of the assault or obstruction, are engaged "in the execution of their duty." This, it is obvious, requires careful consideration; yet it is too often very carelessly passed over, in many classes of cases in which it appears clear that the first act of force or violence emanated from the policeman, and he has attempted to take the man, or has pushed him, or the like. It is in all such cases to be considered whether the policeman, whether by common law or by statute, had any power to touch the party, either by pushing him or taking him into custody. For, if not, then the man would have a right to resist himself from assault; and if death ensued in the struggle the man, if he killed the policeman, would not be guilty of murder, and perhaps not even of manslaughter; and if the policeman killed the man he would be guilty of murder. No part of the law, perhaps, is of greater importance than this; for the very reason that it relates to scuffles, which may lead to violence that may cause homicide. If a policeman, without a warrant, endeavors to arrest a man for a mere misdemeanor not committed in his presence, the man may resist, even to death; and, unless he uses cruelly and unnecessarily a deadly weapon or deadly violence, even if he killed the policeman, he will not be guilty of murder, and may be legally justifiable. That was laid down by Lord Coke in the case of the pursuivant killed by the man whom he illegally sought to arrest; and many cases in our own times have illustrated the doctrine. Lord Campbell held a man not criminally liable for violence in resisting a policemon who, without lawful authority, tried to take his gun from him. Regina v. Archer, "Foster & Finlaison's Rep." 361. A constable has no right to arrest a disorderly person unless he is committing, or is on the point of committing, a breach of the peace; and, if he attempt it, he may be resisted. *Re* Lockley, 4 F. & F. 155; *Re* Spencer, 3 Id. 857. And, if the constable is killed in resisting him, it is not even manslaughter, unless there is some excess. Id. Some years ago, a man was tried at Hertford, before Mr. Justice Hannen, for the murder of a policeman who had, without having a warrant with him (though a warrant had been issued), tried to arrest him for some misdemeanor, and whom the man had killed by striking him with the butt of his gun. The man was convicted only of manslaughter, on the ground of supposed excess; though as it did not appear that he struck more than one blow, it is very questionable whether the conviction was right, but the point was not raised and reserved, as it ought to have been. These cases show the importance of this head of the law, and a decision of the Queen's Bench, during the late sittings, illustrates the principle on which it depends. There, a policeman had attempted, without warrant, to arrest a man for a misdemeanor not

committed in his presence; the man resisted, and struck him, and had been convicted summarily by the magistrate of "assaulting the policeman in the execution of his duty." The court set aside the conviction on the ground that the act of the policeman was illegal, and that, therefore, he was not, at the time of the assault, "in the execution of his duty." Leslie v. Punshon, Q. B., Trinity Sittings. Thus it is clear that, where the policeman attempts to arrest, unless he is legally justified in arresting, resistance to him, to any extent necessary, will be lawful and justifiable, and so can not form the subject of a criminal charge. On the same principle, it is manifest that, if the policeman, having no power to arrest, offer any force or violence to the person, as by pushing, this will justify resistance, or so far excuse it that he will not be justified in arresting the party for the resistance; and, if he attempts to arrest, the man may resist apprehension, and the policeman, if assaulted, will not be "assaulted in the execution of his duty," but, on the contrary, will be guilty of illegal violence while being lawfully resisted. This is the class of cases of most common occurrence, and in which misapprehension of the law by the police, and by the magistrates, leads to great illegalities on the part of the police, which provokes violence in resistance, and sometimes leads to fatal consequences. The police have a notion for instance, that if any one is drunk, or making a little noise, the person may be at once arrested and dragged to prison; and daily persons are thus treated, and, if they resist, are charged with assaulting the police in the execution of their duty, and probably convicted summarily or on trial, and visited with severe punishment. Possibly this misapprehension of the law may have arisen from some stringent enactments, in rather loose language, in the Metropolitan Police Act in London, and possibly in some other local acts, in extension of the common law. There is an enactment, for instance, as to being "drunk and disorderly," and there may be one as to "creating a disturbance;" and the knowledge that the police act in such cases in the metropolis may have given an erroneous notion that they may do so every where. But it is obvious that these are extraordinary enactments, deemed necessary for the preservation of peace and order in populous cities; and, being in extension of the common law, and in derogation of personal liberty, they are to be construed strictly; and merely being drunk is not, by the statute, sufficient to justify interference—the words being "drunk and *disorderly*," which must mean disorderly, not only in the sense of being drunk, but of causing annoyance to others. So as to the words "creating a disturbance," it must mean a disturbance tending to a breach of the peace. Yet magistrates constantly allow a very loose and arbitrary application of these statutory powers of the police; and, some years ago, this misapprehension of the law was painfully illustrated. The managing clerk to a large city house, going home one night after dining out, stopped to have a little *badinage* with a servant girl. A policeman—jealous, perhaps, of what looked like poaching on his manor—roughly told him to move on. The gentleman refused; the policeman pushed and hustled him, no doubt to provoke him; the gentleman resisted; a scuffle ensued, in which the gentleman struck a light blow; upon which the policeman arrested him for assaulting him in the execution of his duty; and, supporting the charge by his own testimony, the magistrate convicted the accused gentleman, and sent him to prison for a month. A body of gentleman who knew the unfortunate party—including a barrister of eminence—waited on the magistrate to entreat him to reconsider his sentence; but in vain, and the sentence was suffered. It is manifest that the magistrate, misled by the dangerous looseness in some enactment in the Police Act, mistook the law, and too easily assumed that the policeman was justified in using force to compel a person to move on who was simply having a conversation. It is obvious that the accused ought to have been discharged, and the policeman punished and dismissed from the force. Under no sound canstruction, even of any enactment in the Police Act, could a policeman be justified in assaulting a person engaged in a quiet conversation. But, supposing for a moment that any such monstrous consequence could follow from any enactment in the Police Act, at all events such can not be the law in the country at common law. Yet cases constantly occur which show that similar notions prevail in the country, where the common law applies. In the case mentioned as occurring at the autumn assizes at Maidstone, the man was simply drunk on a country road, and not at all disorderely; the policeman wanted to force him in the direction contrary to his residence; the man naturally wanted to go home; he resisted, the policeman used viotence to force him to go or to take him into custody, and a scuffle ensued, in which the man kicked the policeman, and was convicted of assaulting him in the execution of his duty, and sentenced to a year's imprisonment with hard labor. It should be stated that the man was not defended by counsel, and did not succeed in making the judge understand his case. But cases occur which show that even the judges—prior to the late decision in the Queen's Bench, and even since that decision, not knowing of it—have been rather loose in their notions of what at common law will justify a policeman in using force to a person on the highway. A case occurred at the last assizes at Lewes. before Mr. Justice Grove, which will illustrate the question. A young man sued a policeman for assault; and proved by several witnesses—more than one of them independent—that he was merely talking, with one or two companions at the corner of a street, when the policeman suddenly came over and told him to go on; on his refusing, seized him violently and pushed him across the street, and knocked him down, and then took him into custody, and dragged him through the streets to the police station, and lodged him in a cell, where he was imprisoned all Saturday night, and all Sunday and Sunday night until Monday morning, when he was discharged by the magistrates. The constable denied knocking the man down, but admitted pushing him across the road and taking him into custody; and, although he alleged that the man struck him, this he admitted was after he had seized him and pushed him; and all he could allege in justification was that the man was "making a disturbance," of which, however, he could give no other definite description than that he was talking loudly with two of his friends. Thus, therefore, the question came to this, whether, if a man be talking loudly to a friend, at a corner of a street, and refuses to leave off when desired to do so, a police may seize him, push or drag him along, and if he resists, then drag him off to a police station and place him in a cell for a day or night until he can be brought before a magistrate on such an utter absence of any legal charge as to be at once discharged. For there is not—as the magistrate's clerk no doubt told them—any such offense known to the common law as merely "making a disturbance by talking loudly." In Fielding's "Treatise of the Office of Constable"—which is carefully founded on the authority of Coke and Hale—it is laid down that, "except for treason or felony, a constable without warrant can only arrest for an 'affray;' and that there can be no affray without an actual breach of the peace, as weapons drawn, blows struck or attempted, etc. Words will not make an affray; yet if there be words of me-

nance to beat or hurt any one, then may the constable arrest the offender, and carry him before a justice of the peace.'' And the power to interfere in mere cases of disturbance, disorderly drinking, etc., is said to be confined to cases of such disturbance in a house. No doubt the magistrates' clerk was aware of this, and so advised them; and so they discharged the man. But, if he had committed no offense, then he was entitled to make a counter-charge against the constable of assault; and he made such charge in the action. The learned judge also very properly inquired whether there was any Police Act in force in Brighton that could give peculiar powers to the police beyond the common law; and was told that there was none. He appears, however, to have been under the impression that mere noise, without any idea of a breach of the peace, or any approach to a quarrel or affray—mere noisy talking of friends—might amount to a breach of the peace, justifying the exercise of force by a constable to disperse the persons talking; and he left the question to the jury whether there was such a noise. But this was quite contrary to the authorities, the effect of which is that there must be quarrel and an affray, and menace of blows such as would be an actual breach of the peace, to justify the interference of a constable. The jury, however, were slow to accept the definition of the law thus presented to them, or, at all events, to apply it and act upon it; and they deliberated a long time. The man, however, appeared to have been more than once turned out of public houses, and so was not a good plaintiff; and, on the other hand, a retired police officer gave it as his opinion that, in such a case as was described, the policeman would be justified in interfering; and so, at last, they found for the defendant. But the police officer's idea of the law is, of course, no authority; and the direction of the learned judge is not reconcilable with the best authorities as to the power of a constable at common law. In a case tried, last week, at Leicester, where a man sued a sergeant of police for assault where there was a ''Guy Faux'' disturbance in which —as the police said—the plaintiff had taken part, and they had arrested him, and, on resistance, had struck him, but he had been fined by the magistrates on their testimony, the plaintiff, nevertheless, recovered a verdict. Mason v. Roberts, Leicester Summer Assizes. Yet in that case there certainly was a ''disturbance'' and an ''obstruction''—gathering a crowd, rolling tar barrels about, etc.,—which would justify the police in interfering, and if they were assaulted, then in arresting an assailant; and, therefore, the verdict must have gone on the ground of excess. But where there is mere noise of two or three friends loudly talking or singing, there can be no pretense for the police interfering, and a mere push would be excess because no use of force at all would be justified; and probably, in the case at Lewes, the plaintiff, but for his antecedents, would have recovered a verdict, even on the issue presented to them by the judge. The direction, however was certainly not in accordance with the authorities, according to which nothing short of an actual breach of the peace by blows struck, or such menaces of violence as amount to an affray, will justify a constable in the use of force. Nor will any threat of resistance to himself, if he, without due cause, threatens the use of force, amount to an affray which will justify his arrest of a party, for the affray must arise before he threatens or offers force; and he cannot, by his own menace of illegal violence, provoke an affray to justify an arrest; for then it is he himself who creates the breach of the peace by the threat of illegal violence. He has in such a case, no right to interfere at all. Mere talking or singing does not, at common law, constitute an offense or breach of the peace, and a constable can not arbitrarily make it one by calling it a ''disturbance.'' Unless there is an actual breach of the peace, or an affray, there is nothing of which the common law takes cognizance—nothing which justifies a constable's interference; and if he interferes, and the parties do not desist, and he then threaten force, they may threaten resistance; and, if he uses force, they may resist; and, if he suffers any violence (unless excessive), it is his own fault; and, if he inflicts violence he is himself civilly or criminally answerable, and, if he causes homicide, he is guilty of murder; while, if the person he has assaulted causes death (unintentionally, and with no wicked excess), he is not guilty of murder, nor even of manslaughter, but it is excusable homicide. The fact that death has sometimes been caused in these encounters shows the grave importance of the subject; and cases are constantly occurring which show that many of the police are quite capable of gross abuse of their powers, and of justifying their violence by false charges against their victims. The Court of Crown Cases has lately had before it a case of this kind, and Mr. Justice Hawkins a few days ago, on the Oxford Circuit, inflicted a sentence of just severity on two policemen who had conspired together to trump up a false charge by means of perjury. These instances show that it is necessary to scrutinize very carefully charges made by the police of assaulting them ''in the execution of their duty.''—*London Law Journal.*

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF RHODE ISLAND.

March Term, 1879.

INJURIES CAUSED BY SNOW AND ICE— LIABILITY OF TOWNS.—The provisions of Gen. Stat. R. I. ch. 60, sec. 15, exempting towns from liability for injuries caused by obstructions of snow and ice in the highways, unless notice of the particular obstruction causing the injury has been given to the highway officers, apply to obstructions of snow and ice produced by artificial causes as well as to those produced by natural causes. 2. *Query*, whether the exemption would lie if the obstruction causing the injury was made by the town authorities. Opinion by MATTESON, J.—*Windsor v. Tripp.*

NEGLIGENCE—PRESUMPTION. —When a plaintiff sues for injuries caused by the negligence of another, and his own case shows contributory negligence, he may be nonsuited, otherwise his case should be submitted to a jury. A was found fatally injured in an excavation in a highway. All that was known of the matter was that he had been seen walking along the highway in his usual manner. A's administrator sued the town, alleging that the negligence of its authorities resulted in A's death. *Held*, that the case should be submitted to a jury, and that the jury should consider A's habits as to temperance and caution, and his acquaintance with the locality, in deciding whether he had exercised reasonable care. Opinion by POTTER, J.—*Cassidy v. Angell.*

ESTOPPEL—STATEMENT BY AGENT DISCLAIMING TITLE OF PRINCIPAL TO PROPERTY.—1. S purchased certain articles of A, under an agreement by which they were to remain the property of A until paid for. They were directed and sent to S before being fully paid for, and while in transit were attached as the goods of S. The attaching creditor testified that B, A's agent to sell such articles in the place of S's residence, had told him the goods belonged to S. B denied

making this statement. *Held*, that giving the information testified to by the attaching creditor did not fall within the scope of B's agency. 2. *Held, further*, that such information, even if given by B, would not bind A, unless given under special authority from A to B. Opinion by DURFEE, C. J.—*Skelton v. Manchester.*

ACCORD AND SATISFACTION—TENDER—PAYMENT OF EXCESSIVE INTEREST.—1. A defense of accord and satisfaction is not supported by proof of a tender of satisfaction without proof that the tender has been accepted or received. 2. A, the payee of certain mortgaged notes made by B, sues B for the amount due. B alleges in defense an agreement with A by which B was to find a purchaser for the mortgaged realty who was to pay the arrears of interest, refund certain expenses, and execute new notes to A, whereupon A was to accept the purchaser as his debtor and discharge B. B avers that he found such a purchaser but that A refused to consummate the agreement. A sold the realty at auction under the mortgaged power, bought it in, and brought the suit in question to recover a balance still due on the notes. *Held*, that the defense was bad as an accord and satisfaction, because it only showed a readiness on the part of B to join with A in executing the accord, but showed no satisfaction nor execution of the accord. "The rule that an accord is no bar without satisfaction is not questioned, but the defendant contends that a tender of satisfaction is satisfaction in legal effect. He cites Bradley v. Gregory, 2 Camp. 382, which contains a *nisi prius* ruling of Lord Ellenborough to that effect. The same doctrine is supported by Heirn v. Carron, 19 Miss. 361. But the preponderance of authority is decidedly against it. Peytoe's Case, 9 Rep. 79, Rayne v. Orton, Cro. Eliz. 305; Allen v. Harris, 1 Ld. Raymond, 122; Lynn v. Bruce, 2 H. Bla. 317; Russell v. Lytle, 6 Wend. 390; Hawley v. Foote, 19 Wend. 516; Day v. Roth, 18 N. Y. 448; Clark v. Dinsmore, 5 N. H. 136; Clifton v. Litchfield, 106 Mass. 34; Hearne v. Kiehl, 38 Pa. St. 147; Young v. Jones, 64 Me. 563. These cases maintain or favor the doctrine that the satisfaction must be accepted or received as well as tendered. In Hawley v. Foote, 19 Wend. 516, the case of Coit v. Houston, 3 Johns. Cas. 243 and 559, the last reference being to cases from Radcliff's Mss., which has been thought to hold otherwise, is explained and reconciled with them. We suppose the reason for the doctrine is, that a mere accord is not an obligatory contract, and therefore a tender in compliance with it does not bind the creditor unless he accepted it. If this is so when there is a tender of things which can be received, it is so *a fortiori* when there is no tender, but only a readiness and offer to join with the creditor in executing the accord. The case at bar is of the latter kind. The defendant shows simply a readiness or an offer on the part of a stranger to the accord to execute it in the defendant's behalf if the creditor would put it in his power to execute it by conveying the mortgaged estate to him. The accord remained unexecuted. The creditor has nothing to satisfy the debt. In such a state of things we think it would be going too far to hold that the debt has been satisfied. The cases that go furthest do not go to that extent." 2. The alleged agreement was bad as an equitable defense, being an attempt in violation of the statute of frauds to substitute a new oral contract for the contract evidenced by the auctioneer's memorandum of sale. 3. A debtor after paying specifically as interest higher rates than the law requires can not charge the excess of his payments above the legal rate against the principal of his debt. Opinion by DURFEE, C. J.—*Pettis v. Ray.*

SUPREME COURT OF INDIANA.

October, 1879.

SECRET LIENS—INNOCENT PURCHASER—DEMAND.—Appellant sold and delivered to Collins a safe, with a written agreement that until the last payment was made the title should remain in the appellant. Before Collins had completed the payments he sold the safe to appellee, who had no notice of the above mentioned agreement. Appellant sought to recover the safe without having made demand of it from the appellee. *Held*, that such secret liens upon property are instrumentalities for the perpetration of fraud and injustice upon innocent third persons; are against public policy, and are not to be encouraged. Although enforceable, they can not be enforced against *bona fide* purchasers without notice, unless a demand is first made. 54 Ind. 58; 17 Ind. 90; 6 Ind. 455. Affirmed.—*Hall Safe & Lock Co. v. Rigby.*

OFFICIAL BOND—EXCESSIVE PENALTIES—VALIDITY.—This was an action by the appellee against appellant as surety on the official bond of Rufus Gale, who was the auditor of Jefferson county. The bond was in the usual form, but in the penalty of $5,000, larger than required by the statute. The breaches assigned were that Gale, as such auditor, had drawn certain warrants or orders upon the county treasurer payable to himself, which were drawn without any order from the board of county commissioners. The following questions arose in the case: Is an official bond in a larger penalty than that prescribed by law void? Is such a bond valid as a voluntary bond for the amount of the penalty named therein? Is such bond valid to the amount of the penalty prescribed by the statute for such bond? *Held*, that construing the several statutory provisions together, it is clear that the legislature intended that whatever departure there may have been from the provisions of the statute requiring the bond, in taking it, as to its form or substance, which includes the amount of the penalty named in it, the principal and surety should be bound upon it to the same extent and no further, as if the bond had been in all respects such as the law requires; in other words, that the principal and surety should be deemed liable as upon such a bond as the statute requires. The bond is not void, nor is it good for the whole amount of the penalty named in it; but it is good for the amount required by law for the penalty of such bond. Affirmed.—*Graham v. State.*

LIBEL—PUBLICATION IN NEWSPAPERS—PAROL RELEASE—DAMAGES.—This was an action for libel by appellee against appellant. Appellant was the publisher of a certain paper, and the complaint charged that he caused to be published in said paper certain libelous matter purporting to be a letter from King Kalakau, which, with the editor's comments, was as follows. "Never go into a law suit with Arch. McGinnis (the appellee) so long as he may be the owner of those books that beat Sutherland, Jim Ryan, Conkerly, and whoever they might be brought up against, for McGinnis is chiefest among ten thousand and the one altogether lovely, on the swear. We begin to believe that old Kalakau is no bug-eater, if he is a man-eater, for we met McGinnis under the fish last week in a suit on a plain promissory note for $585, and he came very near swearing us into his debt. If Beecher is really desirous of laying out Theodore Tilton in his suit now in progress in New York City, let him send for our friend McGinnis." Appellant answered, setting up a parol release and matters in mitigation. A trial resulted in a verdict for the plaintiff. *Held*, that it is not necessary that a crime should be charged in order to constitute a written publication a libel.

9 Johns. 214; 9 Ind. 388. Where the publication is plain and unambiguous it is a question of law for the court whether it is a libel or not. 6 Gray, 261; 48 N. Y. 472. Comparing the publication in this case with those which have been held libelous, both in England and America, it must be held to constitute a libel. Where the publication is a libel *per se*, no proof of damage is necessary. The cause of action in this case could be released by parol. 31 Ill. 422; 7 Ind. 597, Judgment affirmed.—*Gabe v. McGinnis.*

SHERIFF'S SALE — FAILURE TO SELL IN PARCELS —COLLATERAL ATTACK.—Suit to set aside a sheriff's sale of real estate, because the sheriff failed to sell in parcels. The plaintiff had judgment setting the sale aside. The sale was held void because the sheriff, through error of judgment, sold the land in a body instead of in parcels, believing that it could not be divided. The ground was a town lot and had never been subdivided. No fraud was imputed to the sheriff. The plaintiff purchased the land of the execution defendant when it was bound by the lien of the judgment on which the sale was made. He took no steps to set the sale aside for irregularity, but waited until the year of redemption had expired, and then commenced suit to recover the ground, treating the sale as void. *Held*, that the sale was not void, and the judgment below was erroneous. It could not be attacked collaterally, but whether voidable in a direct proceeding to set the sale aside, not decided. Citing 19 Ind. 235; 23 Ind. 624; 45 Inp. 235; 59 Ind. 195; 62 Ind. 188. Judgment reversed.—*Nelson v. Bronenberg.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

July, 1879.

FIRE INSURANCE—CONVEYANCE— INSURABLE INTEREST.—Action on a policy of insurance issued by the defendant upon "his frame dwelling-house." At the trial it appeared that the plaintiff was the owner in fee of the land upon which the insured building stood August 5, 1876; that on that day he conveyed the land by a warranty deed to one C; that on Sept. 7, 1876, the defendant issued said policy; that on Nov. 25, 1876, C reconveyed said land to the plaintiff by a warranty deed, and on the same day the plaintiff conveyed said land to N by a warranty deed, N at the same time, and as part of the same transaction, giving back to plaintiff a writing signed and sealed, stating that the conveyance was made simply to secure him from any liability for recognizing as a surety for the appearance of R in a criminal suit, and that the land was to be reconveyed to W upon N being held harmless; that the conveyance to C was for a similar purpose, and that a similar writing had been given by C to plaintiff; that R appeared in the criminal suit, and the land was reconveyed to plaintiff. In the proofs of loss upon a printed form, plaintiff swore that "the property belongs exclusively to me, and no one else has any interest therein." *Held*, that the plaintiff had an insurable interest at the time the policy was issued, which continued till its destruction. Opinion by COLT, J.—*Walsh v. Fire Assn.*

PROMISSORY NOTE — MORTGAGE — MERGER.—The defendants made their joint and several promissory note, payable to the order of L., and secured by a first mortgage upon real estate. After the making of said note and mortgage, the defendants conveyed the equity of redemption to R., by a deed reciting that the latter assumes and agrees to pay the mortgage and interest. After the conveyance to R., the note and mortgage were assigned by the payee to the plaintiff. R., still later, made two mortgages of the premises which came by assignment to the plaintiff, and finally gave the plaintiff a quit-claim deed of the premises, with special covenant of warranty against all persons claiming from or under him, but against none other, and a covenant that the premises were free of all incumbrances made by him, except the two mortgages above referred to by him, and a third mortgage which was discharged before suit. In an action at law upon said note, it was *held*, that the mortgage was not extinguished. To hold otherwise would do injustice to the plaintiff, by depriving him of a personal remedy against the defendants which he did not intend to abandon or surrender. On the other hand no wrong is done to the defendants. So long as they retained the equity of redemption, they kept the right to have a discharge of the mortgage whenever they should pay the note. They saw fit to give up their rights in consideration of the purchase money paid by R. for the equity, and his personal undertaking to pay the mortgage debt. Their position is of their own choosing. Their remedy is against their grantee. Opinion by SOULE, J.—*Tucker v. Crowley.*

SUPREME COURT OF KANSAS.

September 24, 1879.

BUILDING ASSOCIATIONS—LOAN OF FUNDS—PAYMENT OF PREMIUMS—NO USURY. — Where, under the "private corporation" laws of 1868, 1870 and 1871, Gen. Stat. 19, *et seq.*; laws of 2870, pp. 125 and 126; laws of 1872, pp. 169, 170; the charter of an intended private corporation is duly drawn, subscribed, acknowledged and filed in the office of the secretary of State, and a duly certified copy thereof is issued to the company by the secretary of State, such company then has a valid corporate existence, and may legally organize as a corporation. It may then open books for subscription to its capital stock, and when the larger portion thereof is subscribed for and taken and the amount taken is as much as the law requires the corporation to possess, such corporation then has the power to transact such business as its charter contemplates, although the entire amount of the capital stock as fixed by the charter has not yet been subscribed for or taken. 2. A building and saving association fully organized under the said laws of Kansas, whose object is, "the accumulation of a fund by small monthly installments, to enable members of the association to purchase real estate, erect buildings, redeem mortgages, satisfy ground rent, loan money, pay taxes, and effect other similar purposes," has authority to loan money from such accumulated fund to its members. 3. Where a corporation is authorized to loan money but its charter does not expressly authorize it to take a mortgage or other security, the corporation will nevertheless have power by implication to take a mortgage to secure the repayment of its funds loaned, where the debt is *bona fide* and created in the regular course of business. 4. Where a note and mortgage are given to a *de facto* corporation in its corporate name for money loaned by the corporation to the maker of the note and mortgage, and such corporation apparently has the power to loan money and take notes and mortgages therefor: *Held*, that the mere giving of said note and mortgage and the receiving of the money therefor, will, in the the absence of fraud and misrepresentation, be considered such an administration of the

corporate existence and power of the corporation as will estop the maker of the note and mortgage from denying such corporate existence or power. 5. Where a corporation has power to loan money to its members and take security therefor, it may loan money to one of its members and take the joint note and mortgage of such member and another person although the property mortgaged belongs to the other. 6. Under the laws of Kansas, where a building and savings association loans its funds to those of its members only who bid the highest premium for the priority of the loan; and notes are given by the borrower to the association for an amount equal to both the premium bid and money received by the borrower. *Held*, that the contract between the borrower and lender in such a case is not usurious. 7. Where a member of a building and savings association borrows money from the association and gives a joint note of himself and another as security therefor—the mortgaged property belonging to the other person—and also at the same time assigns to the association a share of stock in the association as additional security for the debt, such other person has the right when sued for the debt to have such stock first sold to satisfy such debt. Modified. Opinion by VALENTINE, J., all the justices concurring. *Massey v. Citizens Building, Etc. Assn.*

SUPREME COURT OF WISCONSIN.

September, 1879.

MARRIED WOMAN—NOTE GIVEN BY—LIABILITY OF CROPS RAISED BY HUSBAND AND WIFE JOINTLY.—A married woman, having at the time no separate estate, purchased a farm of a stranger entirely on credit, giving her notes for the price, secured by mortgage of the property. Her husband lives with her on the farm, and controls the farm labor, carrying on the business in her name as her agent, without any agreement as to his compensation for such services; and from the proceeds of the crop raised on the farm she has paid one year's interest on the purchase money, and a certain amount of the principal. The purchase by her having been made in good faith, and not as a means of fraudulently placing the husband's property beyond the reach of his creditors: *Held*, that under the statutes of this State (ch. 44, Laws of 1850, and ch. 155, Laws of 1872; R. S. of 1878, secs. 2342-3), crops raised upon said farm by their joint labor and management, belong to the wife, and are not subject to sale for the husband's debts. Feller v. Alden, 23 Wis. 301, followed, and Lyon v. Railway Co., 42 Id. 548 distinguished. Opinion by COLE, J.—*Dayton v. Walsh.*

RAILROADS—STATUTE AS TO INJURIES TO CO-EMPLOYEES VALID—CONTRIBUTORY NEGLIGENCE.—1. Ch. 173 of 1875 (which makes each railroad company of this State liable for damages sustained by any agent or employee thereof, while in the line of his duty as such, caused by the negligence of any other agent or employee of such company in respect to his duty as such, where the negligence of the person so injured does not materially contribute to the result), is valid, although it does not impose a similar liability upon other corporations or persons. 2. Plaintiff was employed as a section hand to work about defendant's depot yard in a city, and, while he was engaged, under direction of defendant's foreman, in driving a spike to hold a rail on one of the tracks in the yard, an engine used in the yard to make up trains backed cars along the track on which he was at work with his back toward the train, and struck and injured him. The special verdict was that plaintiff knew, when driving the spike, that the switch-engine was switching cars and making up trains in the yard, and was liable to be run on any track, but did not know that the cars were being put on the track upon which he was at work; that it was the custom for the engineer to ring the bell on the switch-engine when it was in motion; that the bell was rung, and heard by the plaintiff, five minutes before he was injured, as the engine passed along a side track to his rear, but was not rung after the engine commenced backing toward him; that he had no reason to assume that it would not be run on the track where he was at work; that it was necessary for plaintiff, when driving the spike, to stand with his back to the approaching train; that, when taking that position, he did not look or listen for the train; and that if he had done so, he might have avoided the injury. The jury further found that the engineer of the switch-engine was negligent in not ringing the bell when backing his train toward plaintiff; that such negligence caused the injury; and that, under all circumstances, plaintiff was not guilty of any want of ordinary care. *Held*, that the court can not say, as matter of law, that plaintiff was guilty of negligence in relying upon the custom as to ringing the bell, and so failing, under the circumstances, to look or listen for the cars; and the question of contributory negligence was therefore properly submitted to the jury. 3. It was also for the jury to determine whether the failure of the engineer to ring the bell while backing cars toward plaintiff, was negligence. 4. It is the settled law of this State, that while a slight want of ordinary care on plaintiff's part will defeat such an action as this, it will not be defeated by "slight negligence" on his part; that phrase properly denoting a want of extraordinary care. Opinion by LYON J., *Ditberner v. Chicago, etc. R. Co.*

CONTRIBUTORY NEGLIGENCE — INCONSISTENT FINDINGS.—M., plaintiff's decedent, a young and vigorous man, whose senses of sight and hearing were sound and unimpaired, and being at the entrance of a hotel about 253 feet west of defendant's railroad, in a village, and having his horses (attached to his wagon) hitched on the same street about 225 feet east of the railroad, heard the long whistle of an approaching locomotive engine, and immediately commenced running down the street toward his horses. At that time the train was half a mile distant from the street crossing, and it whistled again when about a quarter of a mile distant; it was hidden from M's sight until he was within twenty feet of the track, when he might have seen it by looking in that direction; and, being a light special train carrying officers of the company on urgent business, it was running at the rate of about forty miles per hour, and without ringing the bell on its approach. The passenger trains of the company usually run at the rate of twenty miles, and its freight trains at the of twelve miles per hour; and a freight train was due near that time. M did not cease running, or diminish his speed, until he was in the act of stepping on the first rail of the main track, when he was struck by the train and killed—the whistle for the brakes being sounded at the same moment. The jury by special verdict, found that M, after hearing the whistle and the noise of the train, and seeing it, attempted to cross the track in front of the locomotive; that if he had stopped just before going upon the land included within defendant's right of way, and looked in the proper direction, he could have see the train; and that he was not guilty of any want of ordinary care in running upon the track as he did. *Held*, that, in view of the evidence, these findings are inconsistent and it was error to refuse a new trial. Opinion by COLE, J. TAYLOR, J., dissenting.—*Kearney v. Chicago, etc. R. Co.*

SUPREME COURT OF VERMONT.

[Advance sheets of 51 Vt.]

NEGLIGENCE—INJURY ON HIGHWAY—CONTRIBUTORY NEGLIGENCE—EVIDENCE AS TO HIGHWAY AT OTHER PLACES.—1. In case for injury on a public highway, it appeared that the injury was received on a winter road between fifteen and thirty rods in length that ran along by the regular highway and connected with it at each end, and had been generally travelled during a part of each winter for thirty or forty years when the regular highway was impassable from drifts, and had been broken out by the highway surveyor at different times for thirteen years next before the injury complained of, and had been repaired by him within a week of that time. There was no evidence that it was ever opened by the selectmen or by their direction, or in any way except as above. *Held*, that it was inferable that the road was broken out, used, and repaired by authority of the selectmen, and that the plaintiff might recover as for an injury received on a public highway on a declaration alleging the injury to have been so received. 2. The injury was claimed to have been caused by a cradle-hole and a snow-drift extending diagonally across the travelled track of the road. Plaintiff testified that he had known of the condition of the road and the existence of the cradle-hole for three weeks, and knew that the place in question was a dangerous place. *Held*, that plaintiff was not necessarily guilty of negligence in driving into the cradle-hole, and that in driving into and through it he was bound to the exercise of ordinary care only—such care as a man of ordinary prudence would exercise under like circumstances. 3. Plaintiff was allowed to read in evidence a deposition to which defendant objected for that it appeared therefrom that at the taking thereof defendant's counsel objected to questions put by plaintiff's counsel as leading, and requested the magistrates to write the questions and the objections thereto, and the magistrate refused. *Held*, that as the court might have admitted the deposition in its discretion, even if the question had been leading, there was no apparent error. 4. Plaintiff was also permitted to show the condition of the road five days before the day the injury was received, and defects other than the one alleged to have occasioned the accident, such as new drifts, etc., and to show the condition of the main summer road at a point five or six rods beyond its intersection with the winter road, and different from the place where the injury was received. *Held*, inadmissible, and that as it was prejudicial to defendant, the excepting party, its admission was a revisable error. Opinion by ROSS, J.—*Coates v. Canaan.*

BOOK NOTICE.

AMERICAN INTER-STATE LAW. By DAVID RORER of the Iowa Bar, author of "Judicial and Execution Sales." Edited by Levy Mayer, of the Chicago Bar. Chicago: Callaghan & Co. 1879.

This will be a decidely useful text book, the importance of the subject being seen in the fact that over 2,000 cases are cited by the author. The author's labors are shown in the further fact that the principles enunciated in these 2,000 cases are very fairly stated in a volume of little over 350 pages of text. The subject here discussed, to use the words of the author "embraces the law which governs the American States in their dealings and relations with each other as well as with the National government, and the extent of recognition and binding force which is accorded the citizens and laws of each State and of the national government in the American Courts." But this does not include international law as the same exists between foreign States, nor the political functions of the American States or Union, even where these may have come before the courts. The questions discussed in this treatise are such as frequently come before the profession in their practice; and this being so its usefulness is very manifest.

The treatment of the adjudicated cases is at once concise and exhaustive. Mr. Rorer appears to have been satisfied in nearly every case to give the conclusions of the courts without criticism and without comment. He shows what the law is, and rests there, which, in a book of this size, is, perhaps, all that could possibly be done. The topics are various; the following among the more important of the chapters being sufficient to show the diverse and intricate questions which have already arisen in this branch of the law: correlation of government, citizenship and allegiance, suability of States; inter-State right of suit, jurisdictional requisites; concurrent civil jurisdiction, State and national; common law, civil law and law of State and national courts; inter-State equity jurisdiction and practice; inter-State law of practice; rules of property and rights of same in State and national courts; actions and suits on judgments and decrees; inter-State proof of records, judicial proceedings and laws; proceedings by foreign attachments; inter-State insolvent discharge by State court; actions for torts and transitory actions; penal and statutory actions not enforceable in other States; extra-territorial force of laws; statutes of limitations; marriage and divorce, Inter-State validity thereof; inter-State legal status of persons; criminal jurisdiction; inter-State rights, powers and duties of executors, administrators and guardians; foreign private corporations; receivers, other trustees and trust funds; removals to United States courts. Under these titles and a number of others the American decisions have been systematically arranged, and though the author does not put forward the common claim that he "has cited *all* the reported cases on the subject of his treatise," yet we believe that a careful examination of the book will show that very few of importance have been passed over. There are, of course, some omissions—in stating the law governing a contract to be partly performed in several States, for example, the author is content to cite two very recent Iowa cases, and to make no mention of a number of other authorities likewise in point. Thus no trace of the following cases is to be found in any part of this book, though properly belonging there: Hale v. New Jersey Steam Navigator Co., 15 Conn. 539; Pennsylvania R. Co. v. Fairchild, 69 Ill. 260; Knowlton v. Erie R. Co., 19 Ohio St. 260; Maghee v. Camden &c. R. Co, 45 N. Y. 514; Gray v. Jackson, 51 N. H. 9; Barter v. Wheeler, 49 N. H. 9; Rixford v. Smith, 52 N. H. 355; Hoadley v. Northern Transportation Co., 115 Mass. 304, and Canter v. Bennett, 39 Tex. 303. But these omissions do not affect the character of this work as a treatise upon the principles of inter-State law, although as a digest of the reported cases it must be considered, to this extent at least, incomplete.

The profession to whom this book should soon become familiar will be pleased to learn that it is the work of a living author in spite of the exceedingly curious title-page. An editor of a law book certainly suggests a deceased writer and we are at loss in concluding this notice as to how much of our congratulations upon the excellence of the work is due to Mr. Rorer and how much to "Levy Mayer of the Chicago Bar." When we open a new edition of Blackstone or Kent or Story, the question always is how well or how badly the writer who has undertaken the editing of the volumes has performed his work. The text of the author has been examined long ago, and it is not for us to disturb the

verdict, which a generation of lawyers have given. That is *res adjudicata* as to him; not however as to the new editor who had no part in the writing of the work itself and appears now for the first time. But in the case before us author and editor present themselves together. Together they have produced a creditable work, and one which will be of value to the profession in every State in the Union; and if each is entitled to a moiety of praise there is still enough to divide. Mr. Mayer may have done an equal share of the work or his office may have been simply that of the official reporter in some States—to read the proof, make the table of cases and index,—in which event his portion has been only passably well done. In the other case we have presented to us a specimen of inter-State authorship.

NOTES.

W. W. Johnson has has been elected to the Supreme Court of Ohio *vice* Chief Justice Gilmore, defeated.——The Governor of Kentucky has appointed L. D. Husbands, John Feland, and H. A. Tyler, of the bar of that State, to hear the appeal in the case of Buford v. Commonwealth.——The *Irish Law Times* notes the following point in the law of extradition which arose in a recent English case: A German wine merchant surrendered to his bail to answer to the charge of having committed certain frauds in 1874, in the district of Berlin, where, it was alleged, he had been already tried and sentenced for the same offense, but had escaped before the completion of his term of imprisonment. The prosecution and the prisoner were represented by several solicitors. At an early stage of the inquiry one of his solicitors took objection to the warrant, on the ground that a person who had been already punished by the foreign tribunals could not be extradited even though he may have evaded a portion of his term of imprisonment by escaping from the custody of the "sleepy officials" of a German prison. There was no clause in the extradition treaty which would warrant the arrest of a man if he had served one hour of the penalty imposed upon him abroad. The judge decided that the point raised was fatal to the claim,

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On the motion for an injunction in the case of *The Western Union Telegraph Company v. The American Union Telegraph Company of Indiana, The Wabash Company, and the Central Union Telegraph Company*, before Mr. Justice Harlan and Drummond, J., in the United States Circuit Court, for the District of Indiana the following opinion was delivered by Mr. Justice HARLAN, on the 31st of July last. "In the case of the Western Union Telegraph Company against the American Union Telegraph Company and others, in the Circuit Court of the United States for the district of Indiana, I am of the opinion: 1. That the Wabash Railway Company, by its numerous acts of ratification subsequent to its organization, became bound by the contract of May 2nd, 1870, as fully as the Toledo, Wabash & Western Railway Company would be if it were in existence and operating the lines of railway in question. 2. Notwithstanding the relation which some of the promoters of the American Union Telegraph Company, hold to the Wabash Railway Company, the former must be regarded in this suit as an entirely distinct corporation, duly organized under the laws of Indiana, with power to construct and operate lines of telegraph in that State. 3. It was competent for the Railway Company which entered into the contract of 1870, to grant to the Western Union Telegraph Company the privileges, for a term of years, of using its right of way for the purpose of constructing, maintaining and operating lines of telegraph. 4. But consistently with the provisions of the act of Congress approved July 24th, 1866, and with the principles announced in the case of Pensicola Telegraph Company v. Western Union Telegraph Company, 96 U. S. 19, the Railway Company could not by contract put it in the power of the Western Union Telegraph Company to exclude from such right of way other telegraph companies, which like the Western Union Telegraph Company accepted the provisions of the said act of 1866, and whose lines when constructed and in operation would not disturb the possession or materially obstruct the operation of the lines of that company. The defendant Railway Company interposes no objection to the occupancy of its right of way by the American Union Telegraph Company; on the contrary it has assented thereto and waived, or does not demand compensation therefor. It was unnecessary, therefore, to institute proceedings against the railway company to condemn its right of way for telegraph purposes. I am satisfied that the new line can be constructed and operated on the railroad company's right of way without interfering with ordinary travel thereon, and without substantially interfering with the successful operation of any lines which complainant has erected or is likely to erect, or need, on and over the same right of way. The complainant is entitled to full protection against interference with the use of its lines, but it is not entitled to be protected by injunction in the exclusive use of the Railway Company's right of way assumed to be granted by the contract of 1870, contrary, as I think, to the public policy declared in the act of Congress and in the foregoing decision of the Supreme Court of the United States. It may be true that the defendant Railway Company has violated the terms of the contract of 1870 by voluntarily assenting to the use of its right of way by the American Union Telegraph company without compensation. Still the court can not make that violation the basis of an injunction against the new company, without putting it in the power of railway companies operating the post roads of the United States, by private agreement with a telegraph company, to defeat the purposes of the act of 1866, which was to make the erection of telegraph lines on the post roads of the United States (the consent of the owners of the right of way being obtained, or such right of way being condemned for telegraph purposes and compensation therefor made), free to all corporations, submitting to the conditions imposed by Congress, even against hostile State legislation. If, in such cases, State legislation can not prevent the occupancy of post roads for telegraph purposes, by such corporations as are willing to avail themselves of the act of Congress, much less could such results be rightfully obtained through private contracts of corporations. Complainant may have an injunction, if it so desires, against all interference whatever with the operation and use by it of its present lines of telegraph, upon and along the roads of the defendant Railway Company, other than such interference as may arise or result from mere business competition with other companies constructing rival lines; and further orders will, in that event, be made during the pendency of this suit, as may be necessary to prevent such interference, but the application for an injunction to prevent the construction and operation by the defendant telegraph company and all lines of telegraph whatever, upon such right of way, is denied. Judge Drummond will meet counsel in Chicago on the 20th, and such orders will then be entered as may be consistent with what is here said. The views herein expressed are equally applicable to the case between the same parties pending in the Circuit Court of the United States for the Southern District of Illinois, and similar orders will be entered in that case."